NOR-PAE

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

(1)

No. 131

NORRISTOWN HERALD, INC.,

Petitioner,

vs.

GEORGE BAUSEWINE

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

WILLIAM F. QUINLAN,
JOHN J. O'CONNER,
Counsel for Petitioner.

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NORRISTOWN HERALD, INC.,

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GEORGE BAUSEWINE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Norristown Herald, Inc., defendant below, respectfully prays that Writs of Certiorari issue to review the judgments of the Supreme Court of Pennsylvania, which affirmed the judgments of the Common Pleas Court of Montgomery County, Pennsylvania, entered in favor of the plaintiff below, George Bausewine; said judgments having been entered in amounts totalling $12,500.00, upon verdicts totalling $50,000.00; remittiturs totalling $37,500.00 having been filed by the plaintiff below as an alternative to the grant of a new trial.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended. (28 U. S. C. Section 344 (b).)

The decision of the Supreme Court of Pennsylvania was rendered March 19, 1945 (R. 545).

The Petition for a Re-hearing was denied April 12, 1945 (R. 561).

Summary Statement of the Matters Involved

1. The petitioner, Norristown Herald, Inc., is a daily newspaper, published at Norristown, Montgomery County, Pennsylvania. Ralph Beaver Strassburger was, at the time of the publication of the editorial and articles hereinafter referred to, President of said corporation.

2. The respondent, George Bausewine, was at the time of the publication of the two editorials and three news articles (R. 15, 17, 19, 24, 25), and until his subsequent conviction upon the charge of receiving bribes, Chief of Police of the said Borough of Norristown.

3. Upon the publication of the two editorials (R. 15, 17) and the first of the news articles (R. 19), plaintiff below entered suit, alleging that he had been libelled by the publication of them. A second suit was subsequently entered upon the publication of the latter two news articles (R. 24, 25), plaintiff below alleging that he, again, had been libelled.

4. In each case defendant below filed answers, setting up the pleas of "not guilty," "truth," and "privilege."

5. The cases being at issue, were tried together, before the Honorable Harold B. Knight and a jury, which rendered verdicts, in favor of the plaintiff, as follows:

In the first case (being Common Pleas No. 36)	
against Ralph Beaver Strassburger	$12,500.00
Norristown Herald, Inc.	25,000.00
In the second case (being Common Pleas No. 83)	
against Ralph Beaver Strassburger	$12,500.00
Norristown Herald, Inc.	25,000.00

6. Motions for new trials were duly filed, and upon them new trials were granted. The Lower Court stated in its opinion (reported as *Bausewine* v. *Strassburger*, 50 D. & C., 525) (Appendix "A", 19, 22, 23):

> "The amounts of the verdicts alone, showed that the jury must have been swayed more by passion and prejudice than a desire to fairly compensate plaintiff for the injury done him, or to reasonably punish the defendants for their wrongdoing."
>
> "A verdict based on passion and prejudice should not be allowed to stand. *It cannot be cured by remittitur. Right and justice require that it should be set aside and the case tried again by an impartial jury.*" (Citing Atlas v. Fort Pitt Brewing Co. 83 P. L. J. 421) (Italics ours).
>
> "Why should a verdict in part be retained if the jury were really influenced by prejudice and passion is a pertinent inquiry." (Citing Greer vs. Reece et al, 14 District Reporter 658).
>
> "Our ideas of proper and fair verdicts in these cases are so drastically different from the findings of the jury, that *to grant new trials unless remittiturs were filed, would be in effect substituting verdicts of the judges for verdicts of the Jury.* Courts can and do exercise the power to correct excessive verdicts by granting a new trial unless a remittitur is filed, but when

the verdict thought proper by the Court is much less than the amount of the verdict of the jury, to *grant a new trial unless a remittitur is filed goes beyond the scaling down of a verdict, and substitutes the finding of the Court for the finding of the jury.* (Italics ours).

7. Plaintiff below thereafter discontinued both actions against the defendant, Ralph Beaver Strassburger (R. 31).

8. The cases against your petitioner were again tried before the Honorable Harold B. Knight and a jury. This trial was marked by highly prejudicial and immaterial references to an alleged investigation of Mr. Strassburger by the Federal Bureau of Investigation (R. 43), by the prejudicial and irrelevant statements of plaintiff (R. 155, 158), his counsel (R. 439), and his witnesses (R. 74), to which due exception was taken and proper motions for a mistrial made, all of which were denied by the Trial Court. Illustrative of the manner in which some of the prejudice was created against the defendant are the following extracts from the record:

By Plaintiff from the witness stand (after he had been warned by the court to exclude immaterial and prejudicial detail):

> "He (Strassburger) then went into a tirade of abuse, branding the President of the United States" (R. 158).

By Counsel for plaintiff, in his speech to the jury:

> "Nothing short of a substantial verdict for punitive damages will ever jolt this man, Strassburger, and his privately controlled corporation out of it * * *" (R. 446) (It is to be noted that at the time of trial Mr. Strassburger was not a defendant; that he was not alleged in the pleadings to have acted on behalf of your petitioner or in furtherance of its business; that any opinion he may or may not have held concerning the President of the United States was in no wise pertinent to the issues involved; that these

immaterial references to the F. B. I., and arguments made in time of war could only serve to prejudice the jury, and deprive your petitioner of a fair and impartial trial and that due process of law guaranteed under the Constitution and its Amendments.)

9. Plaintiff below did not allege that he had suffered any special damages. As to general damages in this case, the Lower Court is of record as follows:

> "There is little evidence which would support a claim for substantial general damages." (Bausewine vs. Strassburger, 50 D. & C., Pa. 525) (Appendix 22).

As to punitive damages, the trial court properly charged the Jnry that, under the Law of Pennsylvania (R. 306):

> "• • • punitive damages must bear some reasonable relation to the general or compensatory damage awarded."

10. The Jury, disregarding the evidence in the case and the charge of the Court concerning damages, rendered the following verdicts against your petitioner:

In the first case (being Common Pleas No. 36), $15,000.00.

In the second case (being Common Pleas No. 83), $35,-000.00.

11. Your petitioner thereupon duly filed its motions for new trial, alleging *inter alia* (R. 389, 391):

The verdicts were against the evidence.

The verdicts were excessive and obviously the result of prejudice, passion or sympathy.

The verdicts were contrary to the charge of the Court.

12. The Lower Court *admitted* that the verdicts were "excessive" (516a); however, although the verdicts again totalled $50,000.00, and one was $10,000.00 in excess of a former verdict in that same case, concerning which the

Court had said in its former opinion (*Bausewine* v. *Strassburger*, 50 D. & C. 525 (Appendix "A," 19):

> "The amounts of the verdicts alone, evidence that the jury must have been swayed more by prejudice and passion than a desire to fairly compensate the plaintiff or reasonably punish the defendant * * * a verdict based on passion and prejudice cannot be cured by remittitur * * * right and justice require that it be set aside and the case tried again by an impartial jury;" (Appendix 22)

the Court this time ordered remittiturs filed, totalling $37,500.00 (R. 519, 520).

13. The Lower Court in its opinion filed after the second trial, admitted that the present verdicts were inspired by prejudice and recited in justification of its refusal of new trials, only its conviction (R. 518):

> "that the jury had no *preconceived prejudice* or resentment against the corporation or its president * * * *any feeling against the defendant corporation* or its president, Mr. Strassburger, that may have existed in the minds or hearts of the jurors, was *engendered by the facts of the case as those facts were developed by the plaintiff's witnesses.*" (Italics ours.)

14. The Lower Court denied your petitioner a trial by a fair and impartial jury, as guaranteed by Section 6, Article 1 of the constitution of Pennsylvania and the Fourteenth Amendment to the Constitution of the United States, and upon the excuse that:

> "These cases have been tried twice and the same verdict has been rendered against this defendant each time * * * new trials may and probably will result in other excessive verdicts," (R. 519). "Substituted *verdicts of the judges for verdicts of the jury,*" ordered remittiturs filed, with the result that

judgments were entered against your petitioner, as follows:

As to the first case (being Common Pleas No. 36), $3,750.00.

As to the second case (being Common Pleas No. 86), $8,750.00.

15. Appeals from these judgments were duly lodged with the Supreme Court of Pennsylvania. Your petitioner there assigned as error (#14) (#16) *inter alia* (R. 537, 538):

> The action of the Lower Court in ordering the filing of remittiturs in these cases, which action constituted an abuse of judicial discretion, resulting in a deprivation of defendant's right to trial by jury. (Appellant's Brief in Sup. Ct. Pa., page 1, question 7, and argument page 79).

16. In an opinion filed (R. 545) the Supreme Court of Pennsylvania dismissed all of your petitioner's exceptions and affirmed the judgments of the Lower Court.

17. Your petitioner then filed a Petition for Re-Argument (R. 556), again respectfully calling attention to the fact that your petitioner was being deprived of its Constitutional right of trial by a fair and impartial jury, in contravention of the Fourteenth Amendment of the Constitution of the United States, and Article 1, Section 6 of the Constitution of Pennsylvania (Question raised Assignment of Error #14 and in Appellant's Brief, pages 69 to 75).

In that petition your petitioner characterized that action, as not only depriving your petitioner of its right to trial by jury, but argued that the attempted substitution of judicial discretion therefor, constituted an unwarranted judicial infringement and invasion of the freedom of the press, contrary to the guarantees contained in the Fourteenth Amendment to the Constitution of the United States, and in Article 1, Sections Six and Seven of the Constitution of the Com-

monwealth of Pennsylvania (Question raised in Appellant's Pennsylvania Supreme Court Brief, pages 51, 53 and 55).

18. The Supreme Court of Pennsylvania dismissed the Petition for a Re-hearing on April 12, 1945.

19. A Petition was then filed with the Supreme Court of Pennsylvania, praying that the Record in the case be held until your petitioner had a reasonable time in which to petition your Honorable Court for Writs of Certiorari. That Petition was allowed, and the Record is now so held.

Federal Questions

1. Has your petitioner been denied "due process of law" and "trial by jury," as protected by the Fourteenth Amendment, where a State Court rested its decision upon the findings of material facts implied in verdicts of an admittedly prejudiced jury; denied a new trial, but reduced verdicts in the amount of $50,000.00, by remittiturs in the amount of $37,500.00.

2. Was the action of the State Court in substituting its judicial judgment for the verdicts of an admittedly prejudiced jury, an exercise of a post-publication judicial censorship, contrary to the guarantees of a free press, as expressed in the First Amendment to the Constitution of the United States, and protected from abridgment by a state in the Fourteenth Amendment?

3. Has your petitioner been denied "due process of law," and "trial by jury," guaranteed by the Fourteenth Amendment, where a State Court, in time of war, denied defendant's motions for mis-trial, based upon highly prejudicial and immaterial references to, and arguments upon, matters improperly reflecting upon the patriotism of the president of the defendant corporation?

Opinions

The Opinion filed by the Court below after the first trial of this case is attached hereto. It is reported in Pennsylvania, at 50 District and County Reports, 525; (Appendix "A," 519).

The opinion of the Lower Court, filed after the second trial, appears (R. 504).

The Opinion of the Supreme Court of Pennsylvania appears (R. 545). It is reported, 41 Atl. (2nd) 736.

Origin of Federal Questions

By the nature of the first two questions involved, the federal questions could not be raised in the Lower Court, inasmuch as the denial of a trial by a fair and impartial jury, the substitution of judicial discretion therefor, and the denial of a free press, did not appear in the case until the Lower Court had filed its Opinion.

These questions were raised for the first time in the Supreme Court of Pennsylvania. The question of denial of trial by jury was raised in the Seventh Question presented to the Pennsylvania Supreme Court, under Statement of Questions Involved, and was based upon Assignment of Error No. 14, in due accord with the procedure established for appeals in Pennsylvania. This question was argued orally and upon pages 69 to 79 of Appellant's Brief there filed.

The third federal question was raised for the first time in the Lower Court in Defendant's Argument for a New Trial. It was again raised in the Supreme Court of Pennsylvania in the fifth question listed under Statement of Questions Involved. That question was raised in the Appellate Court of Pennsylvania upon Assignments of Error Nos. 5, 8 and 9.

William F. Quinlan,
Philadelphia;
John J. O'Connor,
New York.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 131

NORRISTOWN HERALD, INC.,

Petitioner,

vs.

GEORGE BAUSEWINE,

Respondent

BRIEF

Trial by Jury in a Libel Case Is a Requisite of Due Process of Law in Pennsylvania

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The right to trial by jury, in civil cases grounded in libel, is historic, in Pennsylvania. It was established in the early common law of Pennsylvania, and is therefore guaranteed in Article 1, Section 6 of the Constitution of Pennsylvania:

> "Trial by jury shall be as heretofore, and the right thereof remain inviolate." (Purdon's Digest, Penna. Constitution, page 108)
>
> "The purpose of the constitution (Pa.) undoubtedly was to preserve the jury trial whenever the common

law gave it * * *" (*Van Swartow* v. *Commonwealth*, 24 Pa. 131, 132 (1854))

Your Petitioner Was Accorded the Form, But Denied the Substance of Trial by Jury

It is conceded that the forms of trial by jury were duly accorded your petitioner. However, the substance of trial by jury has been denied your petitioner, in that, the jury which heard the case was admittedly motivated more by prejudice and passion than any desire to reach a fair and proper verdict upon the evidence.

The trial court once granted a new trial in these cases, for the reason that verdicts identical in total amount with the verdicts rendered by the present jury:

> "alone showed that the jury must have been swayed more by passion and prejudice than a desire to fairly compensate plaintiff for the injury done him, or to reasonably punish the defendants for their wrongdoing" (Appendix 22).

At that time, it concluded:

> "A verdict based on passion and prejudice should not be allowed to stand. It cannot be cured by remittitur. Right and justice require that it should be set aside and the case tried again by an impartial jury" (Citing *Atlas* v. *Fort Pitt Brewery Company*, 83 P. L. J. 421) (Appendix 23).

The Lower Court in that opinion further stated in reference to the amount of these verdicts:

> "that to grant new trials unless remittiturs were filed would be, in effect, *substituting verdicts of the judges for verdicts of the jury*" (Appendix 23).

After the second trial it did that which it precisely said it had no right to do; it "*substituted verdicts of the judges*

for verdicts of the Jury." The denial of trial by jury was more flagrant after the second trial than it would have been had the Court ordered remittiturs filed after the first trial, for the reason that one of the verdicts was $10,000.00 in excess of a verdict which the Court had previously stated:

> "showed that the jury must have been more swayed by prejudice and passion than a desire to fairly compensate plaintiff * * * or to reasonably punish the defendant * * *" (Appendix 23).

This Court has held:

> "but a State Court may not by any of its agencies disregard the prohibition of the Fourteenth Amendment. Its judicial authority may keep within the letter of the statute prescribing the forms of procedure in the Courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with the amendment. *In determining what is due process of law, regard must be had to substance and not to form*" (Chicago-Burlington Railroad vs. Chicago, 166 U. S. 226). (Italics ours.)

The existence of prejudice in the minds and hearts of the jury is impliedly admitted in the opinion of the Lower Court, filed after the second trial (R. 504).

> "We are convinced that the jury had *no preconceived prejudice or resentment against the defendant corporation or its president.*" (Italics ours.)
>
> "Any feeling against the defendant corporation, or its president, Mr. Strassburger, that may have existed in the minds or hearts of the jurors was, *engendered by the facts of the case, as those facts were developed by plaintiff's witnesses*" (R. 518). (Italics ours.)

It is fundamental that a party has a right to trial by a jury, which is not only free of "preconceived prejudice

or resentment" against it, but by one which remains free of prejudice and resentment, and reaches its verdict solely on the evidence.

The Supreme Court of Pennsylvania in its Opinion recites eight material issues of fact, which it holds were for the determination of the jury. (*Bausewine* v. *Norristown Herald*, 41 Atl. (2nd) 736, 741, 742) (R. 545). It finds that there were sufficient facts for the jury to conclude against the defendant, but it ignores the fact, that in the absence of "prejudice and resentment * * * in the minds and hearts of the jury," these issues might have been determined in defendant's favor.

Moreover, should it be determined that plaintiff is entitled to a verdict on the merits, such a determination would not excuse the Court, in depriving your petitioner of a trial by a fair and impartial jury:

> "and the fact that the Court's judgment may be justified on the merits, does not obviate the requirement of a fair trial. As was said in Union Pacific Railroad Co. vs. Syas, 246 Federal, 561, at page 568, '* * * But no judgment is just if not obtained by due process of law; otherwise courts could enter judgments without trial.'" (Inland Steel Company vs. N. L. R. B., 109 Federal (2nd) 9.)

This is precisely what the State Court in the present case has done. It has recognized that the present verdicts were rendered by a jury that was prejudiced and motivated by resentment. It has disallowed the damages as assessed by the jury for that reason; but motivated by expediency, it has "*substituted its verdict for that of the jury*" (R. 519), and it has assessed what it considered proper damages. This it may not do.

State Court Denied Petitioner's Right of Trial by Jury, for Expressed Reasons of Expediency

That the Lower Court was motivated by expediency appears clearly in its Opinion (R. 519),

> "These cases have been tried twice and the same verdict as to the amount of damages has been rendered against this defendant each time. New trials may and probably will result in other excessive verdicts."

Expediency, or convenience, or a natural desire to be rid of harassing delay did not justify the Court in depriving your petitioner of a trial by a fair and impartial jury.

> "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored" (Inland Steel Co. vs. N. L. R. B., 109 Federal (2nd) 9).

The Action of the State Court in Substituting Its Judgment for That of a Jury Constitutes a Post-Publication Judicial Censorship, in Contravention of the First and Fourteenth Amendments.

To permit a Court to substitute its judgment for that of a prejudiced and partial jury in a libel case is to permit a Court not only to deprive a defendant of due process of law, but to establish itself as a judicial censor over that which may or may not be published. This would be in contravention of the constitutional guarantees of a free press (First and Fourteenth Amendments), and would permit a post-publication judicial censorship, unacceptable to American standards of a free press.

An examination of the Record clearly indicates the reasons for the prejudice that existed in the minds and hearts of the jurors. In the first place, the president of the defendant corporation bears a name of German origin.

Counsel for the plaintiff was permitted to introduce immaterial references to an alleged investigation of the president by the Federal Bureau of Investigation. These references all arose out of an alleged conversation between the plaintiff and the president of the corporation, in which conversation the president of the corporation, Mr. Strassburger, was alleged to have requested the help of the plaintiff, who was then Chief of Police of the Borough of Norristown, in learning the names of the owners of certain automobiles, the occupants of which had been harassing Mr. Strassburger. From the plaintiff's testimony, it appears that the sole purpose sought to be served by Mr. Strassburger in obtaining this information was to report it to the Federal Bureau of Investigation. The seeking of this information, and the plaintiff's refusal or inability to obtain it, was cited by plaintiff as the inspiration for the alleged malice in the publication of the articles. On the contrary, the origin of the articles was founded in the conduct of the Chief of Police toward the citizens of Norristown, who complained concerning it to the defendant newspaper. It would have been sufficient in the case for the plaintiff to have testified that he had been requested to obtain information for Mr. Strassburger, and that he refused to do so, without the introduction of the references to the alleged involvement with the Federal Bureau of Investigation. With this, plaintiff was not content, and his witnesses testified:

> "Mr. Bausewine is not going to help you out. He is going to stand by the Government. I said, 'You got yourself in a mess with the Government, you have to get yourself out of it.' " (R. 74).

This statement was neither material to the issues, nor true in fact.

And again:

By Plaintiff (from the witness stand, after he had been warned by the Trial Court to exclude prejudicial and immaterial detail):

> "He (Strassburger) then went into a tirade of abuse, branding the President of the United States" (R. 158).

This prejudice, having been brought to bear against the president of the corporation, was transferred to the corporation by counsel for the plaintiff in his speech to the Jury (R. 446):

> "Nothing short of a substantial verdict for punitive damages will ever jolt this man Strassburger, and his privately controlled corporation out of its —."

Counsel was also permitted to refer in his closing address, to Mr. Strassburger as "the real defendant in the case". (R. 439.)

It can easily be understood that in war-time, a person bearing a German name, having had introduced against the corporation of which he is president, these immaterial references to the alleged investigations by the Federal Bureau of Investigation, being accused of having gone, "into a tirade of abuse against the President of the United States," could hardly be expected to receive a fair trial at the hands of the Jury.

In conclusion, therefore, it is respectfully suggested that your petitioner has not had its day in Court. It has not had a trial by a fair and impartial jury, but before a jury that was deliberately prejudiced against the defendant by the plaintiff; that the State Courts have recognized that your petitioner did not have a fair trial, but motivated by expediency, have tried to substitute their judgments there-

for, contrary to the guarantees contained in the Constitution and in the Seventh and Fourteenth Amendments.

Your petitioner therefore prays that Writs of Certiorari be allowed to the end that new trials may ultimately be granted and justice done.

And it will ever pray.

WILLIAM F. QUINLAN.
JOHN J. O'CONNER.

APPENDIX "A"

IN THE COURT OF COMMON PLEAS, IN AND FOR THE COUNTY OF MONTGOMERY, PENNSYLVANIA

No. 36, September Term, 1942

No. 83, September Term, 1942

GEORGE BAUSEWINE

vs.

RALPH BEAVER STRASSBURGER and NORRISTOWN HERALD, INC., a Corporation

Sur: Motions for New Trials and for Judgments N. O. V.

Opinion Filed After First Trial

KNIGHT, *P. J.*:

These libel cases were tried together, and resulted in verdicts for the plaintiff, aggregating Seventy-five thousand Dollars: Fifty Thousand Dollars as against the corporate defendant and Twenty-five thousand Dollars as against the individual defendant.

The plaintiff, George Bausewine, is, and for a number of years has been, the chief of police of the Borough of Norristown. For many years he served in the police department of the City of Philadelphia, from which city he now receives a pension.

The defendant, Norristown Herald Inc., owns and prints a newspaper called Norristown-Times Herald, which at the time the alleged libels were printed, had a paid circulation of from 12,756 to 14,100 copies. The newspaper is printed in Norristown, and circulated in that borough and surrounding communities.

The individual defendant, Ralph Beaver Strassburger, is the publisher of the Norristown-Times Herald, and the owner of practically all the stock of Norristown-Times Herald, Inc.

On June 30th, 1942, there appeared an editorial in the Norristown-Times Herald, entitled, "Gauleiter Bausewine". On the 28th, of the next month, there appeared another editorial, in the same paper, entitled "Youth and Age in War", and on the 31st, of the same month, appeared a news item headlined "Bausewine's Smashup Recalled. His pal man with criminal record".

Averring that these publications libelled him, the plaintiff brought an action in trespass on September 19th, 1942 as of 36 September Term. The same day, September 19th, the Norristown-Times Herald published the last alleged libel, again with some comment thereon. Two days later the paper published a news article, captioned "Lawless Dry Days Recalled". On October 2nd, the plaintiff instituted the second action of trespass for libel, averring that he had been libelled by the last two publications.

In support of these motions, the defendants have filed six original and sixteen additional reasons. No attempt was made by counsel for the defendants in his brief, to segregate the reasons assigned in support of judgments n.o.v. from those assigned for new trials. At the oral argument, counsel did not stress any reasons for entering judgments n.o.v. nor can we find any reason why such judgments should be entered.

It will be unnecessary to discuss all of the reasons for new trials, for we are of the opinion that these verdicts cannot stand. The jury retired to deliberate on their verdicts at 4:20 P. M., on March 20th of this year. The trial judge waited in his chambers until nearly 7 P. M., and then directed that if verdicts were reached, the jury should seal the same during the evening, the jury arrived at verdicts, which were sealed, and presented by the foreman in open court the next morning, in the presence of all the jurors.

In the paper handed to the trial judge as the sealed verdicts of the jury, were written these words:

"The jury arrived at a verdict in the case of Bausewine vs. Strassburger in favor of the plaintiff with damages to the amount of $25000."

"The jury arrived at a verdict in the case of Bausewine versus Norristown Herald Corporation in favor of the plaintiff with damages to the amount of $50,000."

Then followed a rather long colloquy between the trial judge and the jury, which it is unnecessary to repeat here, and in which the trial judge sought to ascertain just what the findings of the jury were.

After the colloquy, the trial judge stated. In case No. 36

"the jury find a verdict in favor the plaintiff, George Bausewine, and against Ralph Beaver Strassburger and the Norristown Herald, Inc. and fix the damages at $12,500 so far as Ralph Beaver Strassburger is concerned and $25,000 so far as the Norristown Herald, Inc. is concerned. And in case No. 83 September Term, 1942, George Bausewine vs. Ralph Beaver Strassburger and the Norristown Herald, Inc. the jury find a verdict in favor of George Bausewine, plaintiff and against Ralph Beaver Strassburger and the Norristown Herald, Inc., the defendants, and fix the damages as against Ralph Beaver Strassburger at $12,500 and as against the Norristown Herald, Inc. at $25,000."

The jury declared that this was the way they all understood it, whereupon the verdict was taken by the clerk, in the usual way, and entered in the records of the court.

The power of the court to put a verdict in proper form, so as to make it express the intention and real finding of the jury is well settled. Clouser vs. Patterson, 122 Pa. 372; Murtland vs. English, 214 Pa. 325. This power is limited, however, to molding the verdict to make it express the real intention of the jury. MacHolme vs. Cochenour, 109 Pa. Sup. Ct. 563, at page 567.

This the trial judge did, but as so molded the verdicts are improper for the jury assessed the damages in different amounts against each one of two joint tort feasors. This they could not do. McCarthy vs. DeArmit, 99 Pa. 63: McShea vs. McKenna, 95 Pa. Sup. Ct. 338: Reby et ux vs. Whelan, 119 Pa. Sup. Ct. 476: MacHolme vs. Cochenour, 109 Pa. Sup. Ct. 563.

"These verdicts are *grossly excessive.* The plaintiff did not prove, nor did he claim special damage. *There is little evidence which would support a claim for substantial general damages;* the verdicts therefore represent largely punitive damages awarded against both defendants. *The amount of the verdicts alone showed that the jury must have been swayed more by passion and prejudice than a desire to fairly compensate the plaintiff for the injury done him, and reasonably punish the defendants for their wrong doing.*" An examination of the record discloses possibly reasons for this extravagance on the part of the jury.

In these cases the plaintiff charged that the defendants were actuated by personal malice and ill will against him, and there was much evidence from which the jury could have found that the defendants used the power of their newspaper for the gratification of personal objects. While this conduct deserved censure, and would amply support a verdict for punitive damages, it did not warrant the jury in going the length they did in meeting our punishment. The theory of the plaintiff was that the alleged libels were inspired by ill will and animosity, which grew out of the following circumstances, as recounted by the plaintiff and his witnesses.

In November, 1940, the plaintiff called at the home of Mr. Strassburger, at the latter's request. While there Mr. Strassburger handed to the plaintiff, a long letter, describing in minute detail, the actions and movements of certain men, who Mr. Strassburger said, were shadowing him and patrolling his place. He told the plaintiff that he knew these men were F. B. I. agents, and he wanted to get their names in order to have them "fired". The plaintiff did not send him the names, although he made an appointment for Mr. Strassburger to meet the Philadelphia district head of the F. B. I., an appointment which Mr. Strassburger did not keep.

According to the witness Wilson, then editor of the Times Herald, Mr. Strassburger was always after the witness to get a report on the "F. B. I. snoopers" from the plaintiff; that Mr. Strassburger became impatient and angry because plaintiff would not get the names for him, and that he

threatened to dig up dirty and scandalous stories to blast the plaintiff.

It was certainly competent for the plaintiff to show that the alleged libels were inspired by actual ill will and personal malice, and in doing this to show the cause of the animosity. All references to the F. B. I. occurred in conversations between the plaintiff and his witnesses with Mr. Strassburger, and it was impossible to eliminate references to the Federal Bureau of Investigation from these relevant conversations. There can be little doubt, that this evidence given in these war times, tended to prejudice and inflame the jury against the defendants, and helped to account for the excessive verdicts.

A verdict based on passion and prejudice, should not be allowed to stand. It cannot be cured by remittitur. Right and justice require that it should be set aside and the case tried again by an impartial jury. Athas vs. Fort Pitt Brewing Co. 83 P. L. J. 421.

"Why should a verdict in part be retained if the jury were really influenced by prejudice or passion, is a pertinent inquiry". Greer vs Reese et all 14 Dist. Rep. 658.

Our ideas of proper and fair verdicts in these cases, are so drastically different from the findings of the jury, that to grant new trials unless remittiturs were filed, would be in effect substituting verdicts of the judges for verdicts of the jury. Courts can and do exercise the power to correct excessive verdicts by granting a new trial unless a remittitur is filed, but when the verdict thought proper by the court is much less than the amount of the verdict of the jury; to grant a new trial unless a remittitur is filed, goes beyond the scaling down of a verdict, and substitutes the finding of the court for the finding of the jury. The court has power to modify the finding of the jury, but not to substitute its opinion of what the jury should have done.

In Pennsylvania evidence of the financial worth of the defendant is admissible, in cases in which punitive damages are sought. This evidence is admitted as a guide to the jury in ascertaining what would be a reasonable punishment in damages in any given case. In Pennsylvania, as above pointed out, we do not have the doctrine of comparative

negligence, and while a verdict need not be found against all defendants, only a single verdict may be found against those who are held answerable.

When a suit is brought against joint tort feasors, these two well established rules raise a very interesting point regarding the admission of evidence of the financial worth of the defendants. A. and B. are sued as joint tort feasors, both are equally culpable: "A." is a man of modest means —"B." is a man of great wealth. The jury faced with the necessity of bringing in a single verdict against both, would either base their finding on the financial worth of "A", which would be unfair to the plaintiff, or measure their verdict by the wealth of "B", which would be unfair to "A", or reach some sort of a compromise, which would be unfair all around.

But one case in Pennsylvania has been called to our attention, in which this question has been considered, namely, O'Donnell et ux vs Kopp et al, 26 D. & C. page 672. In that case Judge Henninger, of Lehigh County, held that at least it was questionable if evidence of the wealth of joint tort feasors was admissible. There is, however, very respectable authority from other jurisdictions, which holds that evidence of the financial worth of codefendants in tort actions, involving punitive damages, is not admissible. (Italics ours.)

AUG 24 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945

No. 131

NORRISTOWN HERALD, INC.,
Petitioner

vs.

GEORGE BAUSEWINE

BRIEF OF RESPONDENT CONTRA PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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I.

COUNTER-STATEMENT AS TO JURISDICTION

The petitioner's statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment in question fails to comply with the requirements of Rule 38 and Rule 12, paragraph 1 (as incorporated by reference in Rule 38, paragraph 2), and therefore the petition for certiorari should be denied.

In particular, the petitioner's statement fails to show that the nature of the case and of the rulings of the Pennsylvania Supreme Court was such as to bring the case within the jurisdictional provision relied on (Section 237 of the Judicial Code, 28 U. S. C. Section 344(b)). Nor does the petitioner cite any cases to sustain the jurisdiction.

This being a petition for certiorari to a state court, the petitioner's statement should also set forth the ground upon which it is contended the questions involved are substantial (*Zucht v. King*, 260 U. S. 174, 176, 177; Rule 12, paragraph 1, incorporated by reference in Rule 38, paragraph 2).

Although the petitioner asserts (Petition for Certiorari, page 9) that the questions of denial of due process of law, of trial by jury, and of the Constitutional guarantee of a free press were raised in the Supreme Court of Pennsylvania, the printed record nowhere supports this assertion. Counsel for the petitioner has re-

ferred to Assignments of Error Nos. 5, 8, 9 and 14 in the Supreme Court of Pennsylvania. Actually, Assignments of Error Nos. 5, 8 and 9 were based merely upon routine objections made during the course of the trial to alleged prejudicial statements by the plaintiff and his counsel. The triviality of these objections was apparent both to the trial court and to the Supreme Court of Pennsylvania, and by no feat of legal legerdemain is it now possible to transmute these points into substantial federal questions. The same conclusion applies to Assignment of Error No. 14 in the state court, this being merely a blanket exception to the lower court's dismissal of defendant's motion for new trial. Similarly, the argument made in pages 69 to 79 in Appellant's Brief in the Pennsylvania Supreme Court, now relied on in the Petition for Certiorari (page 9), merely urges that the lower court's refusal to grant a new trial was an abuse of discretion, and in no portion of this argument is any federal question raised. An inspection of the opinions of the Pennsylvania Supreme Court (*Bausewine v. Norristown Herald, Inc.*, 41 Atl. (2d) 736), (R. 545-556) and of the Montgomery County Court of Common Pleas (R. 504-530) will show that neither court considered that any federal question was involved or argued.

The petitioner's utter indifference to these requirements of Rule 38 (and Rule 12, paragraph 1, as incorporated therein) is so flagrant in the present case as to demand a denial of the petition for certiorari for this reason.

II.

COUNTER-STATEMENT OF MATTERS INVOLVED IN THE CASE

Counsel for the petitioner has recited a procedural history of the case in his petition for certiorari (pages 2-8) but has omitted to state the facts of the case. The essential facts leading up to the publication of the four libels here in question are as follows, *standing uncontradicted in the testimony:*

On November 26, 1940, Mr. Ralph Beaver Strassburger, the president of the Norristown Herald, Inc., and the owner of its stock, requested his editor, Walter A. Wilson, to get in touch with the plaintiff, who was then Chief of Police of the Borough of Norristown, to see if he would come out to Mr. Strassburger's farm office at "Normandy Farms" for an interview. Mr. Wilson delegated the police reporter, William Rambo, to take Chief Bausewine to see Mr. Strassburger, and he did so (R. 66).

In this conference, Mr. Strassburger said to the plaintiff, "Chief, I know you make a lot of investigations for the F. B. I. around here, and I am in a lot of trouble, and want you to help me." The plaintiff replied, "Before we go into any long conversation, well, Mr. Strassburger, if you want me to help you to get any information from the F. B. I., I will take up your telephone now and call Mr. John Sears, who is Special Agent in town,

and make an appointment for you to go with me to their office tomorrow morning at 11 o'clock." (R. 157).

Mr. Strassburger agreed, and the appointment with Mr. Sears was made. However, the next day when the plaintiff kept the appointment, Mr. Strassburger failed to appear (R. 157).

In further conversation with the plaintiff, after his telephone call to Mr. Sears, Mr. Strassburger told him that a few days before he had been followed to his home from the 30th Street Station in Philadelphia, where he got off the train from Washington, by three automobiles occupied by men who then remained about the environs of his home for two or three days. He asked the Chief to get the names of these men so that he could take it up with the Department of Justice and have them dismissed (R. 161).

Two days after this conference Mr. Strassburger reported the conversation to his editor, Wilson (R. 66). He told Wilson that he had informed Chief Bausewine about the cars that had followed him from 30th Street Station to "Normandy Farms" and had asked him to obtain the names and addresses of the drivers. He said to Wilson that he had already had someone look up the owners of the cars in Harrisburg but couldn't find anything about them because they were marked "official," and he then admitted to Wilson that he knew they were "F. B. I. snoopers," and said he was going to use the power of his newspaper to have them fired (R. 71-72).

A few weeks later Strassburger asked his editor, Wilson, whether Bausewine was going to make any re-

port to him of the names and addresses of "those F. B. I. snoopers." Wilson said he would ask Bausewine. Thereafter he reported to Strassburger that Bausewine refused to do anything because it was purely an F. B. I. matter. Mr. Strassburger then said, "He better get it, or I will run him to hell out of Norristown, he better get that information for me." (R. 73).

After Mr. Strassburger returned from Florida in February or March, 1941, he again asked Wilson if Bausewine had obtained the report that he had requested. Wilson replied, "Mr. Bausewine is not going to help you out. He is going to stand by the Government. * * * You got yourself in a mess with the Government, you have to get yourself out of it." (R. 74).

From that time on, every time Strassburger came in the office he asked about the report. On one occasion several months later he said to Wilson, "He better get it, because that son-of-a-bitch, Bausewine, is going to find out my newspaper has more power hereabouts, than the F. B. I." (R. 74).

This sort of thing continued until Mr. Wilson resigned as editor on October 11, 1941. As long as Wilson was editor he prevented Strassburger from carrying out his threats to use his newspaper to get even with Bausewine by printing scandalous or libelous stories about him. When Strassburger asked what Wilson would do to prevent it, he replied that he would push the type on the floor and prevent the paper going out that day (R. 74-75).

Time and time again Strassburger asked Wilson, "Do

you know any dirt against the Chief of Police?" And Wilson replied that he didn't know anything of the character Strassburger wanted (R. 75).

The last time that Wilson had a conversation with Strassburger was on December 2, 1941, in the newspaper's New York office, where Wilson went to talk over a business proposition with Strassburger involving the Norristown Times Herald. After discussing their business, Strassburger said, "I want to tell you something, Mr. Wilson, now that you are not over there in the newspaper anymore, I am going to do two things. * * * I drove Senator Bean out of Montgomery County politics, and I smeared Ambassador Bullitt in his diplomatic relations; now, I am going to drive Ditter out of Congress, and I am going to drive that son-of-a-bitch, Bausewine, out of Norristown." (R. 75-76).

At the same time he said he had hired a number of men to look up stories about Chief Bausewine, and he had been disappointed that they had not brought him in anything worth while, but he was going to continue hiring men until some investigator brought some story he could publish about him. He mentioned Nick Hayes and Warren Jackson as two of these investigators (R. 76-77). Jackson later turned out to be the agent who supplied the defendant with the untrue story which suggested that the plaintiff had been a bootlegger's truck rider in Florida during the prohibition era, as set forth in the libelous publication of September 21, 1942, (Exhibit P-4, R. 61-62). (R. 194, R. 201-205). The other investigator, Nick Hayes, was referred to by Strassburger himself in his conference of November 26, 1940, with the plaintiff. When

the plaintiff said to Strassburger that he was surprised that he had a character such as Nick Hayes as an associate, Strassburger replied that he needed that type of person around him in order to get underground information (R. 102).

During the course of time when Mr. Strassburger was becoming irritated over the plaintiff's failure to do what he asked, his persistent demands for the report on the F. B. I. men were made not only through his editor, Wilson, but also through his police reporter, William Rambo (R. 102-103). Rambo began to notice that, in the police news that he wrote for the paper, whenever he wrote a story pertaining to Chief Bausewine, the Chief's name was almost always deleted in the editing of the story (R. 105). Thereafter, in the Spring of 1941, Rambo was ordered to stay out of City Hall, and two months later he was "farmed out" to the North Wales section of the County, where he remained until July or August of 1942 (R. 105-106).

In August of 1942, Rambo was called into the office of Mr. Fox, who was then editor of defendant's newspaper. Fox told him that the time had come when he would have to choose between Chief Bausewine and Mr. Strassburger. Rambo replied that this was ridiculous, and that since Mr. Strassburger was his employer and Chief Bausewine was his friend, there was no reason why he couldn't be loyal to both of them. Fox then said that Mr. Strassburger often wanted to fire Rambo, but Fox wouldn't do it because he thought Rambo was doing a good job. He wound up this conversation by saying to Rambo, "You know, Mr. Strassburger has it in for the Chief." (R. 107-109). For a period of time from

the middle of 1941 to the middle of 1942 Mr. Fox had requested Rambo to get information for articles against Chief Bausewine and Rambo had replied that he knew of nothing (R. 110-111).

On Tuesday, July 28, 1942, the article referring to Chief Bausewine as a "Philadelphia castoff" was published. (Plaintiff's Exhibit P-1, R. 51-52). On Friday, July 31, 1942, the article referring to Chief Bausewine as the "pal" of Joe Allegro, who had a long criminal record as a thief and bawdy-house operator (set forth in full in the article) was published (Plaintiff's Exhibit P-2, R. 52-57).

Under date of August 13, 1942, the plaintiff wrote a letter to Mr. Strassburger, as president of the defendant corporation, demanding an apology or retraction of the Allegro article. No answer to this letter was received by the plaintiff (R. 57-59).

On September 19, 1942, the plaintiff filed the first of the two suits here involved, and his statement of claim was served immediately (R. 3). On that same day the defendant's newspaper appeared with a banner headline in very large type, extending the whole width of the paper, announcing: "BAUSEWINE, POLICE CHIEF, SUES TIMES HERALD." In the text of the accompanying articles, explaining the suit, the statement was made (Plaintiff's Exhibit P-3, R. 59-60):

> "The Times Herald gladly accepts the challenge. The suit should give Norristown a long-needed showdown on whether this Borough and its people should

longer tolerate this Philadelphian, former associate of a gangster, as the head of its police department."

On the morning of the same day on which the first suit was filed and served, and the aforesaid article published, Mr. Strassburger called William Rambo into his office and accused him of calling Chief Bausewine and telling him that Strassburger was in the building so that the statement of claim could be served on him. Rambo denied this. Strassburger then asked Rambo, "Why didn't Chief Bausewine get the names of the F. B. I. men that I wanted?" (R. 111). Rambo replied that the Chief's reason was that he worked with the F. B. I. and couldn't get any such information against the Government (R. 113).

Mr. Strassburger had the statement of claim that had just been served on him, and he turned to his editor, Mr. Fox, and said, "Mr. Fox, do we have time to get this in the paper today?" Mr. Fox said, "Yes," and Strassburger then said, "Get the biggest type we have, and we will spread it over the papers." Then he ordered Mr. Fox to leave the office and write the story. When Fox came back with it, Strassburger said, "If the Chief wants a fight, we will give him a good one." Strassburger then edited the article himself and personally inserted the paragraph quoted above (R. 115). After this article was prepared, Mr. Strassburger said to Mr. Fox, "We will go out to my farm over the week-end, and prepare a whole series of articles." (R. 116).

On Monday, September 21, 1942, another article was published in defendant's newspaper (Plaintiff's Exhibit

P-4, (R. 60-62), again carrying a banner headline in large type spread across the full width of the paper, announcing:

"BAUSEWINE WANTED APOLOGY FOR PRINTING COURT RECORD"

"SO, WE PRINT IT AGAIN, WITH QUERY ABOUT BEER TRUCKS PUT UP TO CHIEF OF POLICE"

"LAWLESS PROHIBITION DAYS OF BOOTLEGGING RECALLED—HEAD COP DRAWS PHILADELPHIA PENSION AS WELL AS NORRISTOWN SALARY."

In the body of this article, reference was made to the plaintiff's letter of August 13, 1942, requesting an apology for the Allegro article, and then this statement was made: "The Times Herald has no intention of making an apology for printing a public record." Under the subheading "Lawless 'Dry' Days Recalled," the article went on to suggest, in the form of a rhetorical question, that the plaintiff had been a rider on bootleggers' trucks at or near Boca Raton, Florida, in the prohibition period (R. 62).

On October 2, 1942, the second suit was filed by the plaintiff as a result of the last mentioned two publications. The statement of claim was served on October 21, 1942 (R. 12). On the latter date, William Rambo was again

called into Mr. Strassburger's office and was again accused by him of calling someone to tell them he was in the building (R. 116). He also told him he was too close to Mr. Bausewine and then asked his general manager, Mr. Shelton, if he could discharge Rambo. When Shelton answered that he could, Strassburger told Rambo he was discharged, and when Rambo asked whether he was to assume that he was being discharged because he was too close to Chief Bausewine, Strassburger said, "Yes, that is a good reason, good-bye." (R. 116-117).

Thereafter, Rambo wrote to the general manager of the Times Herald asking to be given a reason for his dismissal and in reply received a letter dated November 18, 1942 (Plaintiff's Exhibit P-5, R. 118) which stated:

> "Before we are able to release letter giving the reason for your dismissal we must have an additional guarantee in writing in which you must state that all communications from us will be held in confidence by yourself and the Guild, and the contents of these communications will not be divulged as the matter is one between an employer, the Norristown Herald, Inc., and an employe, William Y. E. Rambo, and that you will not bear witness against us."
>
> (R. 118)

The foregoing recitation of the facts leading up to the trial of these two actions seems indispensable to an understanding of the issues, since these causes of action, in which the plaintiff is claiming punitive damages, are founded directly upon the presence of actual personal malice in the publication of the four libels.

ARGUMENT

NO FEDERAL QUESTION HAS BEEN RAISED, NOR IS EVEN REMOTELY INVOLVED, IN THE PRESENT CASE

In the guise of arguing that trial by jury has been denied, actually the only question raised by this petition for certiorari is whether the trial court abused its judicial discretion in ordering a remittitur as an alternative to granting another new trial, after the defendant had already been given the benefit of two trials. The State Supreme Court has clearly and properly decided this question under Pennsylvania law, and no bona fide question of federal law is involved in this case at all.

If this case is to be reviewed by the Supreme Court of the United States, then every case which involves allegedly excessive damages involves a federal question. Actually, all that the petitioner is asserting is that the verdicts of the jury were excessive. This is admitted. But the excessiveness has been cured by the remittiturs entered in the trial court, and this has been affirmed by the Pennsylvania Supreme Court, whose decision as to the propriety of a remittitur under Pennsylvania law should be regarded as final.

Surely, on this point there is little that can be added to the concise summation contained in the opinion by Mr. Justice Jones in the Pennsylvania Supreme Court (41 A. (2d) at 742-743) (R. 554):

"We are certainly in no position to say that the learned court below erred when it entered judgments for the plaintiff in one-fourth of the amounts of the verdicts. The cases had been tried twice with resultant verdicts against the appellant in an aggregate amount of $50,000 each time. Punitive damages were especially indicated because of the proofs of actual malice, which had been openly avowed and deliberately carried out. And, the continued existence of the actual malice was further accentuated by the defendant's failure to make good its plea of truth and justification and, particularly, by its persistence in that plea (at the new trial obtained on its motion) after a jury had already discountenanced the plea and had rendered verdicts for the plaintiff in quite substantial sums. See Will v. Press Publishing Co., 309 Pa. 539, 544, 164 A. 621."

The Supreme Court of the United States has ever been mindful that the remission of a portion of a verdict, as a condition for refusing a new trial, is entirely a matter within the discretion of the trial court: *Northern Pacific R. Co. v. Herbert,* 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755 (1886); *Clark v. Sidway,* 142 U. S. 682, 12 Sup. Ct. 327, 35 L. Ed. 1157 (1892).

Numerous decisions of the Supreme Court of Pennsylvania have recognized that there is a wide latitude in the discretionary power of the lower court to direct a remittitur of a substantial amount as an alternative to a new trial, and this is especially so in cases involving unliquidated or punitive damages. In the leading case of *Wirsing v. Smith,* 222 Pa. 8 (1908), the action of the

trial court in directing a remittitur to the extent of $10,000 of a $45,000 verdict for punitive damages for an aggravated assault and battery was upheld, and in reviewing the Pennsylvania law on the subject, Mr. Justice Elkin said (at pages 16-17):

> "The learned trial judge evidently followed the rule of our own cases in this respect in a well-meaning effort to have the matters in dispute between the parties finally determined. In Fleming v. Dixon, 194 Pa. 67, our Brother Brown, in passing upon a conditional order made by the court below and not accepted by defendant, said, 'the relief tendered was refused. The order of court providing for it was made for the benefit of the defendant now complaining of it, and we overrule his second assignment of error.' In Stauffer v. Reading, 206 Pa. 479, the present chief justice, in reviewing the discretionary power of courts in granting or refusing new trials, among other things, said: 'Hence it is well settled that the court may impose terms upon either or both of the parties as conditions of the grant or refusal, and the latitude allowed to the discretion of the court to this end is very great.' It is clear, therefore, that the learned court below was well within the rule of our own cases in this respect, and certainly should not be convicted of error for doing what this court has said he had the right to do in the proper exercise of his judicial discretion."

A remittitur for more than one-half of the amount of the jury's original verdict is by no means without precedent. For example, in *Boyer v. Pitt Publishing Co.*,

324 Pa. 154 (1936), the Pennsylvania Supreme Court approved a reduction in a verdict in a libel case from $6,000 to $2,500, where it appeared that plaintiff had proved no special damages, nor even any exhibitions of actual personal malice such as those in the present case.

Accordingly, the respondent respectfully requests your Honorable Court to deny the petition for certiorari.

Respectfully submitted,
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JOSEPH KNOX FORNANCE,
Counsel for Respondent.